

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
PETITION FOR
REHEARING**

Bpls ORIGINAL
74-1554

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

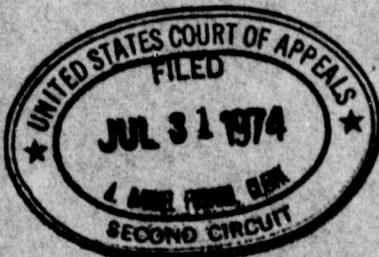
against

MICHAEL PATERNO, GEORGE DENTI and
PATERNO & SONS, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

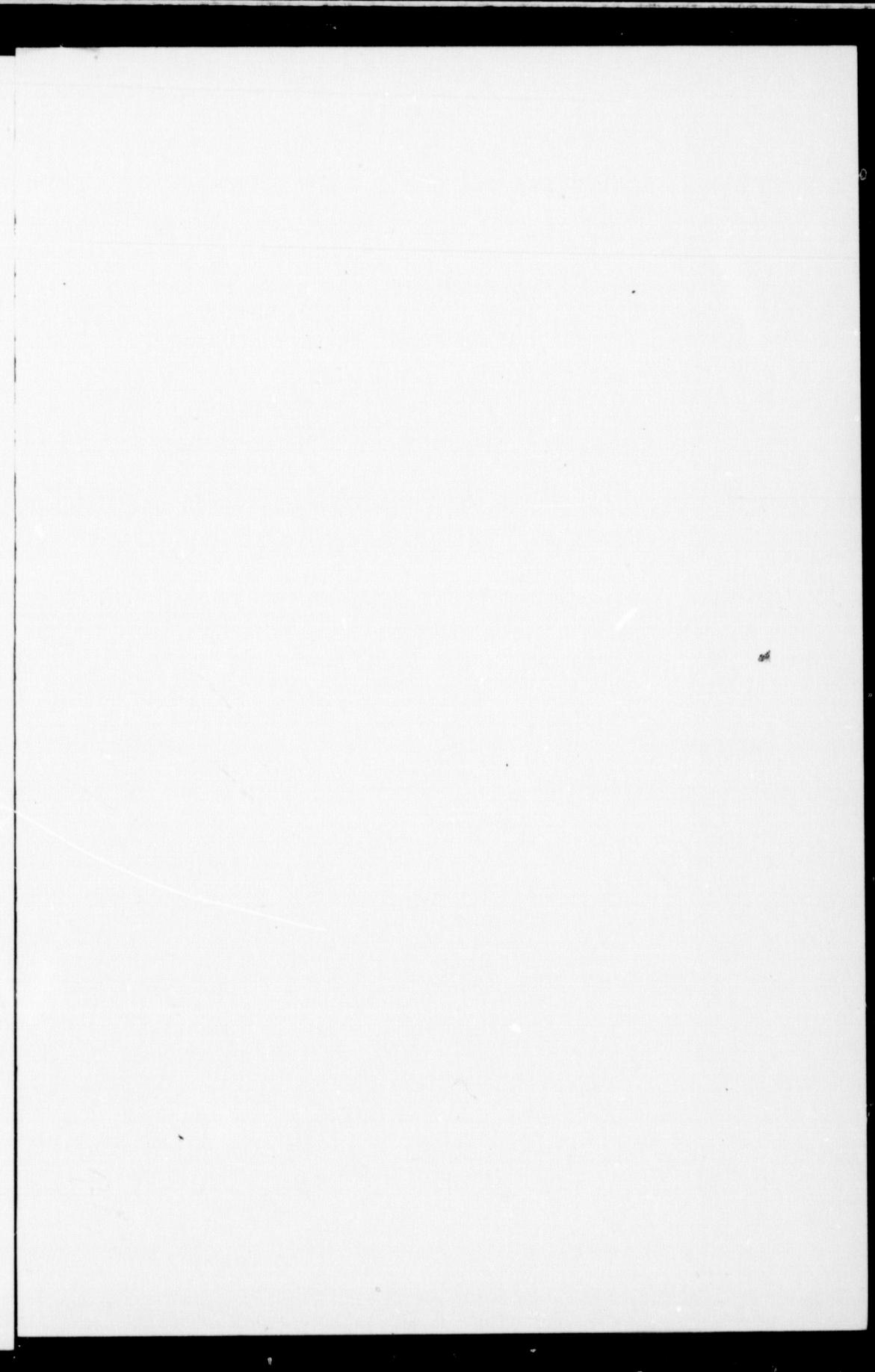
**PETITION OF APPELLANTS MICHAEL PATERNO
AND PATERNO & SONS, INC. FOR REHEARING**



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PETITION OF APPELLANTS MICHAEL PATERNO AND PATERNO & SONS, INC. FOR REHEARING

To the Honorable William H. Mulligan, Harrison L. Winter and Jon O. Newman, Judges of the United States Court of Appeals for the Second Circuit:

Defendants-appellants Michael Paterno and Paterno & Sons, Inc. respectfully petition this Court, in accordance with Rule 40 of the Federal Rules of Appellate Procedure, for a rehearing of this case, which was decided on July 18, 1974. Said defendants-appellants further respectfully suggest, in accordance with Rule 35 of the said Rules, that this petition be treated as one for a rehearing by the full Court in banc, in the event that the petition should be denied by the Honorable Judges constituting the panel which originally heard the appeals herein.

It is respectfully submitted that in affirming the judgments of conviction below, this Court has overlooked the fatal deficiencies in the evidence, so far as the above mentioned defendants-appellants are concerned, and has also overlooked certain important principles of law and their applicability to this case.

POINT I

The evidence was insufficient as a matter of law to establish the requisite elements of wilfulness, guilty knowledge and criminal intent on the part of defendants Michael Paterno and Paterno & Sons, Inc.

Since this Court rendered its decision of affirmance on the voluminous record in this case on the very next day after argument of the appeal, and without any opinion analyzing the evidence or the questions of law presented, it seems reasonable to assume that the Court relied to a

large extent on the assertions made by the Government as to the evidence in its brief and on oral argument.

The Government's brief in no way disputed the accuracy of the statements of fact set forth, or the correctness or applicability of the principles of law discussed, in the main brief of defendants Paterno and Paterno & Sons, Inc. (hereinafter referred to as "the Paterno main brief").

What the Government did do in its brief and on oral argument was to mislead this Court as to what the evidence showed, by indulging in broad conclusory assertions as to the facts having no support in the record and not even accompanied by citations to the record. The Paterno reply brief analyzed every one of those conclusory assertions and showed that there was no basis whatever for any of them in the record.

In its brief (p. 9), the Government asserted that "the average invoice from a legitimate trucker during the four years was less than \$400 whereas it was approximately \$3,000 for the phony truckers." However, that assertion was not accompanied by any record citations, and the Paterno reply brief (p. 7) pointed out that there was no basis whatever in the record for the said statement as to the alleged \$400 average. On the oral argument, Government counsel made a general statement to the effect that the Paterno company's journals for the four years in question would support the assertion in question. However, even though the Government's IRS Agent Rizzo had examined the Paterno company's books and records, no testimony had been given by him or by any other witness with respect to what average would be shown by an analysis of the voluminous Journal entries over the four year period in question.

Counsel for Paterno disputed the Government's assertion on the argument, and the next morning he made an

oral application for leave to submit an analysis of the Journal entries in refutation of Government counsel's assertion.* This Court denied that application at the same time that it affirmed the judgments of conviction, stating that "In view of the overwhelming evidence of guilt we do not consider the point material."

It is submitted, however, that the point is most material, since the Government placed major reliance thereon, and that far from being "overwhelming", the evidence was wholly insufficient so far as defendants Paterno and Paterno & Sons, Inc. were concerned. Thus, the Government made repeated references in its brief (pp. 7, 8, 9-10) to what it claimed to be a substantial difference in amounts between the invoices from the five payees in question and those from other "legitimate" truckers. The Government indeed referred to that alleged difference as a factor "*of greatest significance*" (br., p. 9; emphasis supplied).

In point of fact, as shown in the Paterno main and reply briefs, the evidence on which the Government here relied to establish the essential element of guilty knowledge on defendant Paterno's part, was wholly circumstantial and was entirely too equivocal and tenuous to serve as the predicate for a finding of such guilty knowledge against Paterno.

The Government's evidence consisted almost entirely of (a) evidence which, the Government claimed, showed that the invoices from the five payees in question were in larger amounts and were processed differently than those

* Counsel for Paterno and Paterno & Sons, Inc. is prepared to submit such an analysis in support of this Petition for Rehearing, but hesitates to do so without leave of the Court, in view of the fact that this Court heretofore denied his oral application for leave to submit such material.

from "legitimate" truckers, and (b) evidence of certain statements made by Paterno to O'Reilly and Mrs. Ferraro with respect to the five payees in question. The Paterno main and reply briefs clearly showed that no adverse inference of any kind could be drawn against Paterno from any of the Government's evidence without abandoning the settled doctrine that "suspicion, however strong, is not proof and will not serve in lieu of proof" (see Paterno main br., pp. 19, 27-8).

Furthermore, as regards the statements made by Paterno to O'Reilly and Mrs. Ferraro with respect to the five payees in question, the Paterno main brief (pp. 20-23) showed that, according to the pertinent authorities, no adverse inference could be drawn therefrom against Paterno of consciousness of guilt on his part, under the doctrine relating to false exculpatory statements, since there was no evidence that Paterno knew the statements in question to be false. Though the Government made no attempt to dispute the showing made in that regard in the Paterno main brief, it nevertheless made the bald assertion in its brief (p. 12)—without any supporting citations of any kind—that Paterno's statements "were false statements demonstrating his consciousness of guilt." Government counsel made the same assertion in oral argument, and this Court was undoubtedly influenced thereby.

It is respectfully submitted that a rehearing is appropriate herein to correct the erroneous impressions conveyed by the Government in its brief and on oral argument with regard to the evidence, and to set the evidence in proper perspective for appraisal in accordance with the applicable principles of law.

POINT II

Since the witness James O'Reilly had been granted immunity at the trial, at the Government's instance, by a separate order relating to his trial testimony, it was error and a violation of due process for the trial court to rule that such immunity would not extend to the testimony which O'Reilly would give as a defense witness, either on direct or on cross examination, and to refuse to extend such immunity to him, particularly in view of the fact that O'Reilly's need of immunity was suggested only by the prosecutor and the trial court, and only in connection with the prosecutor's anticipated cross examination of O'Reilly on the general issue of credibility.

The witness James O'Reilly had previously been granted immunity before the grand jury with respect to his grand jury testimony (1196a).* Upon being called as a Government witness, he stated that he would testify without invoking his constitutional privilege (1198a), but the trial court advised that he should be granted immunity with respect to his trial testimony, and a separate order was accordingly made granting him such immunity (1201a-1203a).

O'Reilly then testified as a witness for the Government under the said grant of immunity relating to his trial testimony. On cross examination, defense counsel attempted to elicit testimony from O'Reilly, and to introduce certain documentary evidence through him, to serve as a foundation for subsequent expert testimony, in support of defendants' defense, as to the cost incurred by the corporate defendant for trucking expenses in haul-

* Unless otherwise specified, figures in parentheses followed by the letter "a" refer to the pages of Appellants' Joint Appendix.

ing away excavated earth (1323a-1331a). Following a series of exclusionary rulings (1292a, 1294a, 1315a-1317a), the court then ruled that it would permit defendants to introduce evidence through O'Reilly in support of their defense, but that they would have to call O'Reilly as their own witness on their case for that purpose (1331a).

When O'Reilly was thereafter called by defendants as their witness, the trial court immediately interrupted to advise defense counsel and O'Reilly that the immunity with respect to his trial testimony, which he had been granted as a Government witness, would not extend to any testimony which he would be giving as a defense witness (1458a). Defense counsel advised the court that he proposed to limit the evidence which he planned to introduce through O'Reilly, essentially "to what can be called technical matters" such as "the plans, the photographs and the specifications" (1460a).

The prosecutor thereupon stated, in O'Reilly's presence, that "the questions that I hope to be asking him [O'Reilly] on cross examination may result in a decision to him that he may have committed some sort of criminal act, and I want him to be aware of that * * *" (1462a). The trial court added the comment, "Well, Mr. O'Reilly's history with us as a witness may invite that kind of approach * * *" (1462a).

Defense counsel then noted that O'Reilly had been permitted to give some preliminary testimony in support of the defense theory on cross examination; that the prosecutor had had a full opportunity to pursue the subject of O'Reilly's credibility on redirect examination; and that defendants would be deprived of a fair trial if the prosecutor were to be allowed "to take advantage of the inability of the defense to obtain a grant of immunity" for O'Reilly with respect to his testimony as a defense witness (1466a-1467a).

The trial court asked O'Reilly if he intended to invoke his privilege against self-incrimination, and O'Reilly stated that he did not and also said, "I was under the impression I was just going to be asked—", when he was interrupted by the trial court (1469a). The trial court then told O'Reilly, "Now whatever your impression is, you are subject to cross examination here", and further advised O'Reilly that "in that posture . . . [he] could again plead . . . [his] privilege against self-incrimination, and nobody at that point could compel . . . [him] to answer" (1469a-1470a). Thereupon, O'Reilly stated, "Maybe I should have immunity again" (1470a), and he was excused by the trial court to seek independent legal advice (1471a). O'Reilly did not subsequently reappear as a witness.

It is submitted that defendants were thereby erroneously deprived, in violation of due process, of their right to adduce essential testimony from the witness O'Reilly in support of their defense. It may be noted that one of the reasons thereafter given by the trial court for sustaining the Government's objections to the hypothetical questions posed by defense counsel to defendants' expert witness O'Connell was that defendants should have adduced testimony with respect to the underlying facts from "at least the job superintendent", i.e., O'Reilly (1570a-1571a).

The cases which have held that the trial court has no authority to grant immunity to a defense witness or to demand that the Government seek immunity for such a witness, have not involved situations where immunity was granted to a Government witness. See, e.g., *United States v. Berrigan*, 482 F.2d 171, 190 (3d Cir.); *United States v. Jenkins*, 470 F.2d 1061, 1063-4 (9th Cir.). Indeed, a different question is presented where immunity has been granted to a Government witness. Thus, in *Earl v. United States*, 361 F.2d 531, 534, fn. 1 (D.C. Cir.),

Chief Justice Warren Burger, then sitting on the Court of Appeals "or the District of Columbia, expressed the view that it might well be a violation of due process if the Government were permitted to "use the immunity statute for its advantage" with respect to a Government witness, and "the same mechanism" were not made "available to the accused" with respect to a defense witness. See also *United States v. Jenkins, supra*, 470 F.2d at 1064.

It is submitted that the situation here presented is one in which the considerations noted by Justice Burger have special pertinence. Thus, the Government here used the immunity statute for its advantage to adduce the testimony of O'Reilly as a Government witness, yet the defense was effectively prevented from using the immunity statute to adduce the testimony of O'Reilly as a defense witness. Moreover, it was evident that O'Reilly would require immunity with respect to his testimony as a defense witness only in connection with the Government's anticipated cross examination on the general issue of credibility, and the Government had had full opportunity to pursue the issue of credibility on its case, on redirect examination of O'Reilly. Furthermore, since O'Reilly had been granted immunity by a separate order at the trial relating to his trial testimony, it is submitted that that order would necessarily extend to all the testimony that he might give at the trial.

In addition, as shown in the Paterno reply brief (p. 13), the remarks addressed to O'Reilly by the prosecutor, as well as by the trial court, when O'Reilly was about to testify as a defense witness (1462a), were highly improper by reason of their intimidating effect. Cf. *Webb v. Texas*, 409 U.S. 95; *United States v. Smith*, 478 F.2d 976 (D.C. Cir.).

POINT III

Defendants were denied a fair trial by reason of the action of the trial court in demeaning their defense in the presence of the jury and in erroneously hampering the presentation of such defense.

The pertinent facts and the applicable principles of law in support of defendants' claim that they were denied a fair trial by reason of the action of the trial court in demeaning their defense and erroneously hampering the presentation thereof, were fully discussed in the Paterno main brief (pp. 32-39) and reply brief (pp. 12-15).

It is submitted that the Government failed to give any satisfactory answer to defendants' contentions, and that the issues here involved may well have been misapprehended or overlooked by this Court.

POINT IV

The indictment should have been dismissed because the Government deprived defendants of their right to an administrative conference within the Internal Revenue Service as guaranteed to defendants by published regulations of the Internal Revenue Service.

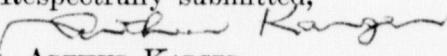
The above point is fully discussed in the separate Petition for Rehearing being filed herein by the co-defendant-appellant, George Denti. Defendants-appellants Michael Paterno and Paterno & Sons, Inc. had previously adopted the said point by reference in their main brief (p. 3), and they hereby adopt by reference the discussion thereof in co-defendant-appellant Denti's Petition for Rehearing.

CONCLUSION

Defendants-appellants Michael Paterno and Paterno & Sons, Inc. respectfully request that this Petition for Rehearing be granted.

Dated: July 31, 1974.

Respectfully submitted,

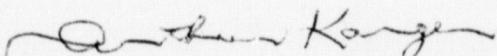

ARTHUR KARGER,

Attorney for Defendants-Appellants
Michael Paterno and Paterno &
Sons, Inc.

Certificate of Counsel

I, Arthur Karger, counsel for the defendants-appellants Michael Paterno and Paterno & Sons, Inc., do hereby certify that this Petition for a Rehearing is presented in good faith and not for delay, and that in my judgment it is well founded.

Dated: July 31, 1974.


ARTHUR KARGER

services of ~~two~~ copies of

he within ~~Petition~~ is

hereby admitted this 31st day

of

July, 1774

J. Lawr. Schuerman *jk*
Attorney for